In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the instant case.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Appendix A, *infra*, pp. 8–9) is reported at 408 F. 2d 681. The decision and order of the National Labor Relations Board (Appendix C, *infra*, pp. 11–34) are reported at 160 NLRB 1603.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1969 (Appendix E, *infra*, pp. 37, 38). The Board's timely petition for rehearing and sugges-

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tion for rehearing *en banc* was denied on May 8, 1969 (Appendix B, *infra*, p. 10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where the National Labor Relations Board sets aside a representation election because of an employer's unfair labor practices and enters an order barring such conduct in the future, judicial proceedings to enforce that order are rendered moot because a second and valid election, which the union again lost, has been conducted in the interim.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in Appendix D, *infra*, pp. 35–36.

STATEMENT

In the fall of 1964, the International Union of Electrical, Radio and Machine Workers, AFL–CIO,[1] initiated an organizing campaign at the Company's electronics plant in Mountain View, California. During the course of this campaign, employee Carol Alvarado was twice called to the desk of her supervisor, Nicola Krest, and questioned concerning her union activities (App. C, p. 18). Krest also threatened that the advent of the Union would result in stricter discipline (App. C, p. 18).

In furtherance of its campaign against the Union, the Company sent Robert Hennemuth, Vice-President for Industrial Relations, from its Massachusetts head-

[1] The Union intervened in the court of appeals, and thus is a party here.

quarters to talk with the Mountain View employees. On February 2, 1965, just two days before a scheduled Board election, Hennemuth delivered a prepared speech to seven separate groups of employees, assembled on plant premises. Hennemuth stressed that, if the Union came in, negotiations would begin from scratch and, accordingly, that employee benefits might be reduced (App. C, pp. 20–21). Hennemuth also announced an improved grievance procedure (App. C, p. 23).

In the ensuing representation election, a majority of the employees voted against union representation. Based on the Company's pre-election conduct, the Union filed both objections to the election and unfair labor practice charges. On October 19, 1965, an unfair labor practice complaint issued, alleging that the Company's conduct violated Section 8(a)(1) of the Act. The Board sustained the complaint and issued an order requiring the Company to cease and desist from such conduct. The Board also set aside the election. (App. C, pp. 12–14, 27, 31–33.)

After the Board petitioned the court of appeals to enforce the unfair labor practice order, the Company moved to dismiss the proceeding on the ground that another election—which the Union again lost—had meanwhile been held and that this fact rendered the enforcement proceeding moot.[2] On February 19, 1969,

[2] Subsequent to the issuance of the Board's order, the Union agreed to the holding of a second election, but that election was also set aside by the Board because of the Company's further acts of interference. On November 1, 1968, while the enforcement proceeding was pending, there was a third election, which the Union also lost; since no objections were filed, the Board certified the results of this election.

the court of appeals, on the authority of its earlier decision in *General Engineering, Inc.* v. *National Labor Relations Board,* 311 F. 2d 570 (C.A. 9), which involved a similar situation, dismissed the proceeding (App. A, *infra,* pp. 8–9).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below—that the holding of a valid rerun election renders moot a proceeding for enforcement of a Board cease-and-desist order in a related unfair labor practice case—is contrary to principles enunciated by this Court and conflicts with decisions of other courts of appeals. In *National Labor Relations Board* v. *Mexia Textiles Mills, Inc.,* 339 U.S. 563, 567, this Court held that an "employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court." For, as the Court pointed out (*id.* at 567), "[a] Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." Accord, *National Labor Relations Board* v. *Pool Manufacturing Co.,* 339 U.S. 577; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 271.[3]

[3] Outside the labor field, this Court has in different contexts indicated that a case is moot only where no "cognizable danger of recurrent violation" exists. *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633. The potential for a recurrence of the Company's anti-union conduct, should further efforts to organize the employees be made, is not entirely speculative. See also, on the general question of mootness, *United States* v. *Trans-Mis-*

Other courts of appeals, faced with the identical situation presented here, have uniformly rejected the claim that a subsequent election renders moot a proceeding for enforcement of a cease-and-desist order relating to employer conduct at the time of an earlier election. As stated in *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (C.A. 7), certiorari denied, 377 U.S. 944, "if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." Accord, *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471, 472 (C.A. 4); *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2).[4]

2. Considerations of sound policy also favor review by this Court. The Ninth Circuit's position encourages employers who have committed unfair labor practices

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souri Freight Association, 166 U.S. 290, 309; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43; *Walling* v. *Reuter Co.*, 321 U.S. 671, 673–674; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257, 260; *Gray* v. *Sanders*, 372 U.S. 368, 375–376.

[4] The position of the Ninth Circuit, as more fully articulated in its opinion in *General Engineering, Inc.*, v. *National Labor Relations Board*, 311 F. 2d 570, 571–572, appears to rest on certain language in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416. There this Court stated that "where the order obviously has become moot, the court can deny enforcement without further ado" (331 U.S. at 428). However, the Court was there merely stating a general and somewhat abstract principle. Moreover, since the issue in that case (whether a Board order covering plant guards was rendered moot by the subsequent deputization of those guards by the city) was entirely different from that here, the language there cannot fairly be read as suggesting that a Board order should not be enforced in the present situation.

which interfere with a free election not to comply with the Board's unfair labor practice order. By declining to comply and thereby compelling the Board to institute court enforcement proceedings, the employer can delay the final resolution of the unfair labor practice question for more than a year.[5] Moreover, in that situation the union would be required to choose between (1) awaiting the completion of this lengthy proceeding and thereby risk a further attrition in the employee support which has already been eroded by the employer's unfair labor practices, or (2) participating in another election without the benefit of employer compliance with the Board's order. Should the union select the latter alternative and lose the later election (which, absent new acts of interference by the employer, would be valid[6]), there would be no enforcement of the Board's unfair labor practice order, and the Union would be denied the protection such order would afford it should it subsequently renew its organizational effort and seek another Board election.[7] Instead, when the union renews its organizational effort, the employer, absent a court-enforced Board order, would be free to counter the union's effort by again engaging in the same kinds of unfair labor practices, without the possibility of triggering

[5] During the period July 1, 1967 to June 30, 1968, the median time between the issuance of a Board unfair labor practice order and a decision by the court of appeals was 542 days. In the present case, the period was 28 months.

[6] The Union here went through two elections; the second one was again set aside because of further acts of interference by the Company (see note 2, *supra*).

[7] Section 9(c)(3) permits another election to be held within a year after "a valid election."

a contempt sanction, and thereby start the same cycle over again. In short, the decision below would in effect reward the employer for his non-compliance with the Act and Board orders issued pursuant thereto (cf. *National Labor Relations Board* v. *Gissel Packing Co.*, Nos. 573, *et al.*, 1968 Term, decided June 16, 1969, slip op., p. 33), and would impair the Act's basic policy of encouraging a prompt and fair resolution of representation questions.

3. Finally, the Ninth Circuit, by reaffirming its earlier decision in the *General Engineering* case, has made it plain that its view on this question is a fixed one. Accordingly, unless this Court takes corrective action, the Board will be required to apply a different rule in the area covered by that circuit than it does elsewhere in the country, thereby negating the congressional intention of achieving a uniform national labor policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JOHN I. TAYLOR,
Attorney,
National Labor Relations Board.

AUGUST 1969.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

No. 22572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT, AND RAYTHEON COMPANY, INTERVENOR

(February 19, 1969)

On Petition for Enforcement and on Petition To Review an Order of the National Labor Relations Board

Before: CHAMBERS, KOELSCH, and BROWNING, Circuit Judges

PER CURIAM:

The Board found that Raytheon Company, in connection with a representation election at its Sunnyvale, California plant, committed labor practices made unfair by Section 8(a)(1) of the Act. In No. 22572, the Board petitions for enforcement of its ensuing

cease and desist order, and in No. 22572A, the International Union of Electrical, Radio and Machine Workers, AFL–CIO, the charging party and intervenor, petitions for a review of the Board's ruling refusing to amend the Complaint.

During oral argument in this court counsel for Raytheon made a suggestion of mootness. With leave of court, Raytheon was permitted to supplement the record and move the dismissal of the proceedings. From the additional materials submitted pursuant to such leave, it now appears without contradiction that since these petitions were filed the Board has held a new representation election and certified the result.

Accordingly, on the authority of *General Engineering, Inc.* v. *N.L.R.B.*, 311 F. 2d 570 (9th Cir. 1962), Raytheon's motions are granted and the proceedings are dismissed.

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APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

No. 22572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND RAYTHEON COMPANY, INTERVENOR

Before: CHAMBERS, KOELSCH and BROWNING, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judges.

APPENDIX C

United States of America Before the National Labor Relations Board

No. 20–CA–3554

RAYTHEON COMPANY

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO

No. 20–RC–6201 [1]

RAYTHEON COMPANY, EMPLOYER

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, PETITIONER

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On June 13, 1966, Trial Examiner William E. Spencer issued his Decision in the above-entitled consolidated proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint. In addition, he recommended sustaining certain objections to the elec-

[1] International Brotherhood of Electrical Workers, AFL–CIO, intervened in Case No. 20–RC–6201.

tion held on February 4, 1965, in Case No. 20–RC–6201, and setting aside the election. Thereafter, the Respondent filed a Statement of Exceptions, a "Brief in Support of Exceptions to Intermediate Report; and in Support of Portions of Intermediate Report," and an "Answering Brief to Brief of IUE in Support of Cross-exceptions." The General Counsel filed a Brief in Support of Certain Portions of the Trial Examiner's Decision, cross-exceptions, and a brief in support of its cross-exceptions. International Union of Electrical, Radio & Machine Workers, AFL–CIO, herein called the Charging Party, filed an Answering Brief to Respondent's Brief, cross-exceptions, and a brief in support of its cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.[2]

[2] We agree with the Trial Examiner that the Respondent violated Section 8(a)(1) of the Act and interfered with the election by Supervisor Krest's coercive interrogation of employee Alvarado, and Vice President Hemmemuth's coercive speeches to the employees. We also find, contrary to the Trial Examiner, that the announcement of new grievance procedures, in such speeches, constituted further violation of Section 8(a)(1) and further interference with the election. However, we find it unnecessary to, and therefore do not, rely on the Trial Examiner's finding of additional grounds for setting

ORDER

Pursuant to Section 10(c) of the National Relations Labor Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Raytheon Company, Mountain View, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following at the end of paragraph 1(a): "and promising new benefits as an inducement to employees not to engage in union activity."

2. Delete paragraph 1(b) and substitute the following: "In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

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aside the election. There is no merit in the Charging Party's exception to the Trial Examiner's denial of its motion, made at the hearing, to amend the complaint to allege additional threats and promises of benefit. See *Local 1474-1, Pipe Coverers, International Longshoremen's Association (J. Q. H. Insulating Co., Inc., et al.)*, 147 NLRB 90, 93, footnote 4. Cf. *Automobile Workers* v. *Scofield*, 382 U.S. 205, 219, footnote 14.

(3) In the Notice attached to Trial Examiner's Decision, add the following at the end of the first indented paragraph: "nor will we promise new benefits as an inducement to employees not to engage in union activity."

(4) Delete from the Notice the second indented paragraph, and substitute the following: "We will not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

(5) Delete from the Notice the last paragraph.

It is further ordered that the complaint, insofar as it alleges unfair labor practices not found herein be, and it hereby is, dismissed.

It is further ordered that the election held on February 4, 1965, among the Respondent's employees be, and it hereby is, set aside, and that Case No. 20–RC–6201 be remanded to the Regional Director for Region 20 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the appropriate unit at such time as the Regional Director for Region 20 deems appropriate. The Regional Director shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by International Union of Electrical, Radio & Machine Workers, AFL-CIO; by Interna-

tional Brotherhood of Electrical Workers, AFL–CIO; or by neither.

Dated, Washington, D.C., Oct. 5, 1966.

FRANK W. MCCULLOCH, *Chairman,*
GERALD A. BROWN, *Member,*
SAM ZAGORIA, *Member,*
[SEAL] *National Labor Relations Board.*

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California

No. 20–CA–3554

RAYTHEON COMPANY

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO

No. 20–RC–6201

RAYTHEON COMPANY, EMPLOYER

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, PETITIONER, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO

Barry Jellison, Esq., and *Morton H. Orenstein, Esq.,* for the General Counsel.

Robert L. Molinar, Esq., and *Selig A. Saltzman, Esq.,* Lexington, Mass., for the respondent.

Marilyn G. Rose, Washington, D.C., for the charging party and petitioner.

Before: WILLIAM E. SPENCER, Trial Examiner

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

The complaint proceeding in this case, brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136; 73 Stat. 519), hereinafter the Act, consolidated for hearing with objections to an election filed by the charging party and petitioner herein in Case No. 20–RC–6201, was heard in San Francisco, California, on January 19, 20, 1966, pursuant to due notice.

The complaint, issued 19 October, 1965 upon a charge filed April 6, 1965, and an amended charge filed October 15, 1965, alleged various conduct engaged in by the Respondent as violative of Section 8(a)(1) of the Act, conduct incorporated in the objections to the election with some additional matters.

The Respondent in its duly filed answer denied the said allegations. Upon the entire record in the case, consideration of briefs filed with me by each of the parties, and from my observation of witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent and Employer

Raytheon Company, a Delaware corporation, is engaged, among other things, in the design, development and manufacture of semiconductor products and solid state devices. It has facilities located in several States, including Massachusetts and California. Its Mountain View, California plant is the locale of matters giving rise to this proceeding.

During the past year Respondent shipped products valued in excess of $50,000 from its California operations directly to customers outside the State.

II. The Labor Organization Involved

International Union of Electrical, Radio & Machine Workers, AFL–CIO, hereinafter the Union or IUE, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

1. *The factual situation; issues*

Pursuant to a representation petition filed by IUE on January 4, 1965, an election among the production and maintenance employees of Respondent's Mountain View, California plant, was conducted by the Board on February 4. The results were that 161 votes were cast for the IUE, 54 for IBEW, an intervenor, and 301 for no union. On February 11, IUE filed a petition to set aside the election and on April 6, the charge of unfair labor practices which initiated the present complaint proceeding. The issue, broadly stated, is whether Respondent by a series of speeches addressed to its employees on February 2 in a captive audience atmosphere, and by various other statements and conduct, violated Section 8(a)(1) of the Act, and by these alleged statements and conduct, and other matters alleged in the objections to the election, interfered with the free choice of its employees to a degree requiring that the election be set aside.

2. *The Krest-Alvarado incident*

In the week or so preceding the February 4 election, Employee Carol Alvarado was twice called to the desk of Nicola Krest, supervisor of the department in which she worked, and questioned concerning her union activities. Alvarado on these occasions was

wearing an IUE badge indicating her support of that union, the only person in her department of some twenty employees that she observed wearing an IUE badge. Krest asked Alvarado why she wanted a union, and when the latter replied that she thought a union could provide employees with a better vacation and sick leave plan and higher wages, Krest replied that it would be impossible for the employees to achieve such additional benefits; that he had not complained to the employees on their work standards, but with a union certain work standards would be set and any employee not meeting them could be discharged; that if the Union was voted in, any employee who was late to work on more than three occasions would be discharged. On the second occasion Krest asked Alvarado if she had attended an IBEW meeting and if so, why. The foregoing is Alvarado's version of the two conversations.

Krest admitted that the conversations occurred; testified in substance that on the occasion of the first conservation he called Alvarado to his desk with respect to her requested transfer out of his department, and that Alvarado initiated the topic of unions by saying that if the employees had a union "things like this [the refusal of a transfer] wouldn't happen." Krest testified, "From that point on, we discussed several things about the union," and, in amplification, mentioned the topics of seniority and work standards. On the latter he testified, "I said that I am quite sure that if a union did come into the plant that the union, if they weren't satisfied with the standards which we had on the jobs, would bring in their own industrial engineers. I felt that if they found that our standard was extremely low, they would raise it, you know, if they thought it was completely out of the picture." Krest did not recall if the union was discussed in his second conversation with Alvarado which was concerned

primarily, as was the first, with her request for a transfer.

I find, in sum, that Foreman Krest questioned Alvarado concerning her union activities, interrogated her concerning her desire for union representation, and stated, in substance and effect, that she stood to lose rather than gain through union representation in the matter of work standards, and would be unable to obtain the benefits she sought. His remarks took on added emphasis and significance when Robert G. Hennemuth, a company official, later addressed the employees on the same general topic of what union representation would mean to them.

3. *The February 2 Hennemuth speeches*

In its captive audience speeches, delivered successively to seven groups of its employees on February 2, the Respondent, through its industrial relations vice-president, Robert G. Hennemuth, counseled its employees to reject union representation. As urged in Respondent's brief, Hennemuth, though unequivocally partisan in his language, made his "pitch" without rancor and in an atmosphere which was undoubtedly calculated to, and did in fact convey the appearance of friendly counsel. At the close of his speech, there would be a period of questions from the floor responded to in good humor by Hennemuth; and other instances of good-humored give-and-take. Nevertheless, Hennemuth made it clear in the introduction to his remarks that he was a top figure in Respondent's heirarchy of officers and therefore spoke with authority, and frequently referred to the "legal" posture of his remarks. The body of his speeches was tape-recorded and transcriptions from the tapes were received in evidence. There were portions of his speech,

however, which were not recorded, and therefore the transcriptions were not necessarily a refutation of the testimony of employees who heard the speeches. The latter, except for variations in emphasis, were not markedly at variance with the recorded portions of the speeches.

Hennemuth's speeches were organized and delievered under four major points or topics, and these will be alluded to seriatum.

First, Hennemuth stressed the importance of all employees voting and the secrecy of the ballot which would protect employees in voting against union representation even though they had signed one or more union authorization cards. "Regardless of whether you signed for one or both, that is not binding on you. * * * When you engage in this voting process on Thursday you are a free person."

Hennemuth's second point, and one that received the greatest emphasis and undoubtedly took precedence over others in the minds of the employees, was that if the employees chose union representation, negotiations on a contract would follow; that such negotiations would start from scratch and the employees could end up losing some of their present benefits;[1]

[1] Excerpts from Hennemuth's speeches: "* * * in a negotiation they [the employees] had to understand that legally the Company and the Union start from scratch * * * what happens in negotiation is that two parties sit down to negotiate and they start fresh—just as though nothing's on the table * * * in negotiations they have to get up to where you are—where the company is, first—before you even get any more." [This point was given added emphasis by a leaflet passed out by Respondent to its employees on January 14, 1965, which stated in part: "When a union comes into a plant, collective bargaining begins not at the present wage level, but at *zero* * * *"] In negotia-

that a union could not guarantee them anything but could gain for them only such benefits as the company would grant;[2] that a union's only weapon for enforcing bargaining demands was the strike and that a strike would impose hardships on the employees who engaged in it.[3] Hennemuth told the employees, "My

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tions an employer might say, "Look, we are sick and tired of paying nine holidays and now we are only going to agree to five."

Further, on the combined credited and undisputed testimony of General Counsel's witnesses, Alvarado, Hudson, Lott and Carpenter, Hennemuth said that while employee insurance was now "free" if the Union won this benefit would have to be negotiated from scratch and the employees might end up having to pay for what they presently were getting free; gave a specific example of a company which took away bus fare formerly given its employees as a fringe benefit, when a union came into the plant; and said they they should not be misled by thinking that the benefits they presently had would necessarily continue if the Union came into the plant.

[2] Excerpt from Hennemuth's speeches: "* * * you should bear in mine that a union cannot guarantee you anything. Now I'm telling you, legally if I may in this sense, because if a union wins the right with any company to represent the employees involved, a period of negotiation must follow after that point and there comes into being between the union and the company after that *only what the company wants to agree to* * * *" [Emphasis supplied].

[3] Excerpts from Hennemuth's speeches: "So let's suppose that the company doesn't want to agree—what recourse does the union have? The only recourse is to strike * * * I'm sure you all have had some exposure to what a strike can mean. It's a harsh thing, it is a weapon that in my opinion personally is not a terribly useful thing to the unions because it imposes such a hardship on the people who are members of the unions. They go without pay during the entire period of the strike. Now sometimes there is a 'strike fund' a union may have but this is usually inadequate and then it usually often doesn't last except for a couple of weeks and it requires you to go out and do

suggestion to you is that working for this company under the circumstances as I know them at least, I feel you don't need that kind of representation because I really feel that compared to other American citizens across the country working for a number of different companies, you don't look too bad at all, really, as far as your benefits are concerned," that in the light of all these circumstances the employees should carefully evaluate the Union's claims put forth in its election propaganda because "you will not get anything more from this company with a union than you would get without a union and in the meantime you are going to be paying out $40 to $50 a year and perhaps more."

Hennemuth's third point consisted largely of a review of Respondent's wage structure and fringe benefits and comparisons with other plants operating under union contracts; a statement of Respondent's grievance procedure characterized as a "darn firm open door policy" on the part of its local manager, Fred Wills, and a promise that in the future this procedure would be further liberalized by permitting any aggrieved employee who was not satisfied with the response of the local office to appeal directly to Hennemuth in Respondent's main office; and an elaborate defense of Respondent's existing sick leave policy: "So bear in mind, that even if a union does come on these premises as a result of Thursday, that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't. This is not because we don't think it's a desirable benefit * * * We are just not ready to put in that kind of an ex-

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picket line duty, and so forth. Now, this might be all right in its place, understand. My suggestion to you is, that working for this company under the circumstances as I know them at least I feel you don't need that kind of representation, etc."

pense in our fringe benefit package at this time, especially where we are now convinced that we already have a package that is as good as any you will find in industry generally." In this connection, Hennemuth told the employees that "no unionized plant in Raytheon has paid sick leave either." In summing up, Hennemuth told the employees, "So again, repeating the third thought I want to leave with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here and in the future it won't be any better just because a union is on the premises."

Hennemuth's "fourth and final" point was in substance an appeal to the loyalty of the employees. Coupled with this was the statement that in the three years that Respondent had operated its Mountain View plant, with an outlay of millions, it had "never taken one lick of profit out of here." Followed a discussion of the company's "continuing determination to make a go of this place," and a final appeal, "So this is why I say to you that Raytheon in these three years has never given up on you. You know, we've had some rough sledding and we are asking you, please, to continue to work with us as a team. Give Mr. Wills the opportunity to make a profitable venture out of this and do it, please, without the intervention of some unnecessary outsider who can cause trouble by harrassment [sic], who can take money away from you, and who we are convinced is not going to bring you anything in return that you wouldn't get otherwise."

4. Concluding findings

While the Act provides that an employer's failure or refusal to agree to a union's proposals does not in and of itself constitute a refusal to bargain in good faith, this by no means licenses any employer to enter into bargaining negotiations with a mind closed against extending or varying existing employee benefits. An employer who tells his employees that they can gain through union representation only what he, the employer, unilaterally *chooses* to give them, and that they will gain no additional benefits through bargaining but stand to lose benefits already enjoyed, is not merely predicting what may be the ultimate results of collective bargaining, or stating mere possibilities, but is making flat statements of a pre-determined position on bargainable issues and is therefore voicing a rejection of the bargaining principle. What could be more illustrative of such a state of mind than Hennemuth's statement to the employees with respect to sick leave, an issue which obviously was a campaign issue: "So bear in mind, that even if a union does come on these premises as a result of Thursday [the election], that does not mean any such union will get paid sick leave. *And I'm saying to you right now, it won't,*" [emphasis supplied] and his further statement, "So again, repeating the third thought I want to leave with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here *and in the future it won't be any better just because a union is on the premises.*" [Emphasis supplied.] The impact of these and kindred statements on the employees' minds is neither negatived nor neutralized by an occasional reference to the

employees' freedom of choice and Respondent's intention to deal with them in good faith, regardless of the outcome of the election. As a matter of fact, in all the Hennemuth speeches there is not a single unequivocal statement that if the employees choose union representation the Respondent will enter into negotiations with an open mind on bargaining issues and will attempt, in good faith, to reach an agreement satisfactory to both the employer and the employees—essential elements of good faith bargaining. In the same category is Hennemuth's statement that in talking to the employees he was walking a tightrope since he could neither offer benefits nor threaten reprisals in the matter of their choice of union representation, in a context in which he was instilling fear into their minds that union representation though costly would be futile, and that a union's only recourse in obtaining for the employees anything that Respondent did not choose to give, was the strike with the attendant hardships that would be visited on the employees in such event. In sum, for all their carefully contrived appearance of amiability, the Hennemuth speeches were larded with statements which amount to an anticipatory refusal to bargain and as such were poorly concealed threats to deprive Respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing. Supervisor Krest's interrogations of Alvarado about her union activities and statements that she could not gain but would lose through union representation, though minor in comparison, are not properly considered as isolated statements of a minor supervisor, but as a part of Respondent's general plan of coercion as fully demonstrated in the Hennemuth speeches.

I find that the Respondent through Krest's anti-union statements and interrogation of Alvarado and, in major part, through the Hennemuth speeches, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in conduct violative of Section 8(a)(1) of the Act.[4]

[4] Hennemuth's statement that employees might address him directly in Respondent's eastern office with respect to grievances, is alleged to constitute an unlawful inducement, and while undoubtedly it was made to court favor with the employees, I am unable to view it as substantial enough to constitute a violation of Section 8(a)(1). Employees would have to be naive indeed to believe that Hennemuth in Respondent's eastern office would seriously entertain an individual grievance arising in the Mountain View plant already weighed and rejected by the local plant manager, and in any event a disgruntled employee could always avail himself of the freedom of the mails to address officials in the eastern office. I am also unable to view increased wages and benefits extended employees in September, 1965, some six months after the election, as a reward for the employees' rejection of union representation. In extending these benefits Respondent did compliment the employees on their "loyalty" but reference was also made to increased production. The matter is not entirely free from doubt due to the rather gloomy profit-and-loss picture given the employees by Hennemuth in February prior to the election, but I do not find a preponderance of evidence supporting an unlawful motive. Respondent's interrogation of Employees Shirley Ball and Katherine Lott through its counsel, Robert L. Molinar and Selig A. Saltzman, alleged to constitute unlawful interference with General Counsel's witnesses, has flimsy support in the testimony of Ball and Lott except that it does appear that they were asked if they had been interviewed by Board agents, and the latter was questioned about future appointments, if any, with such agents. The interviews appear to have been centered on the employees' recollection of Hennemuth's speech; the employees do not appear to have been questioned concerning the substance of their interviews with Board agents;

Ball testified that Molinar told her not to worry about being subpoenaed to testify, "just to come in and tell the truth" as best she could, and if questioned by Board agents to tell them that she had been interviewed by the company lawyers; Lott admitted that at the start of the interview Molinar told her she was free to answer questions or not as she saw fit. While I believe it was improper for Respondent's counsel to question these employees concerning their meetings with Board agents preparatory to testifying, and it is clear that such interrogations were in no way necessary or material to the preparation of a defense, the coercive element appears to have been slight if not altogether non-existent.

IV. Objections to the Conduct of the Election

Pursuant to a stipulation for certification upon a consent election executed by the parties on January 14, 1965, an election was conducted among Respondent's employees on February 4. On February 11, the petitioner herein filed timely objections to the conduct of the election. On June 2, the Board's Regional Director issued and served on the parties his report on objections, in which he recommended to the Board that the objections be consolidated for hearing with the complaint herein. On June 23, the Employer filed timely exceptions to the report and to the Regional Director's recommendation on the consolidation of cases. The matter was referred to the Board and on August 10, the Board found the exceptions without merit and ordered the hearing herein.

On all the evidence before me I find the objections to the conduct of the election well taken and shall recommend that the election of February 4 be set aside.

As set forth in detail in the preceding section of this report, the employer in seven speeches addressed to groups of employees sought to convince them that they should reject union representation. Only one day intervened between these speeches and the election.

The petitioner requested permission to address the employees in similar fashion and the request was ignored. The employer's rule against "selling, soliciting, canvassing or distributing without prior management approval," effectively foreclosed the petitioner from presenting its claims and arguments to employees while they were on company premises. It issued numerous pamphlets but for their distribution had to rely on passing them out to employees on their entering or leaving company premises, mailing them to the employees' homes, or passing them out at union meetings. With respect to the first, many of the employees lived in geographical areas removed by miles from the plant, and therefore substantial numbers drove to and from work, about 95 percent according to estimates. The petitioner being barred from the company's parking lot, had to rely on reaching these employees as they were driving in and out of the lot. As to mailing, the petitioner had to ascertain the mailing address of the employees "by word of mouth" and as a result could reach only a small percentage of the total employment. Its meetings, according to its representatives, were attended largely by those who were highly partisan on behalf of the Union or who vigorously opposed it, and therefore the Union was unable to reach those who were neutral or not yet convinced one way or the other. Also, inasmuch as the plant was operating on three shifts, and meetings during the work week normally would follow at the end of a shift, obviously the hours were not propitious for drawing large numbers to the meetings.[5]

In short, on the facts of this case it is clear that through Respondent's restrictive rule on solicitations

[5] For instance open meetings for employees on the swing shift would start at 1 a.m.

and because of other circumstances noted above, the employees were effectively barred from anything approaching an equal or comparable opportunity for hearing arguments favoring union representation, or contesting and refuting the propaganda literature and the captive audience speeches of the Employer. For this reason alone I would hold that the employees were denied the freedom of choice such as would have been theirs—and to which I think they were entitled—had they been afforded at least a reasonable approximation of equal access to the copious representations made by both proponents and opponents of union representation. It is on the basis of these findings, and interference violative of Section 8(a)(1) of the Act as found in Section III above, that I recommend that the election of February 4, 1965 be set aside.[6]

Upon the basis of the foregoing findings of fact and upon the entire record in the case I make the following:

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[6] I agree with petitioner that coercive conduct engaged in by General Foreman Burke and Foreman Blackburn with respect to employees wearing IUE badges, not alleged as constituting unfair labor practices and occurring prior to a representation petition being filed, may nevertheless be considered as background to conduct in issue, such as Krest's interrogation of Alvarado and the Hennemuth speeches, and when so considered tends to place the remarks of Krest, but more particularly Hennemuth, in their true perspective, since the few intervening months would not have sufficed to erase from the minds of affected employees fears of reprisal stemming from the Burke-Blackburn interrogations and threats. However, the exclusion from consideration of such background matters would leave, unaltered, the conclusions expressed in the text above.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

4. Respondent's conduct as found in Sections III and IV, *supra*, improperly affected the results of the election of February 4, 1965.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and that it take certain affirmative action to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

As I have found that Respondent's conduct improperly affected the results of the election I shall recommend that the election be set aside.

RECOMMENDED ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is recommended that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees in an unlawful manner concerning their union activities; threatening or implying a loss of existing benefits in the event they choose union representation; threatening or implying an anticipatory refusal to bargain on bargainable issues, such as sick leave, in such event.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Post in its Mountain View, California, plant copies of the notice attached hereto marked "Appendix A."[7] Copies of said notice to be furnished by the Regional Director for the Twentieth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Twentieth Region in writing within 20 days from the date of the

[7] If these Recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals Enforcing an Order" for the words "A Decision and Order."

receipt of this Decision what steps Respondent has taken to comply herewith.[8]

It is further recommended that the election which was conducted on February 4, 1965, be set aside.

Dated: June 13, 1966.

WILLIAM E. SPENCER, *Trial Examiner.*

Notice to All Employees Pursuant to The Recommendations of a Trial Examiner of The National Labor Relations Board And in Order to Effectuate The Policies of The National Labor Relations Act (as Amended)

We hereby notify our employees that:

We will not interrogate our employees in an unlawful manner concerning their union affiliation and activities; interfere with their freedom of choice with respect to union representation by stating or implying a loss of existing benefits in the event they choose union representation; stating or implying an anticipatory refusal to bargain in good faith on bargainable issues in such event.

We will not in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join or assist International Union of Electrical, Radio & Machine Workers, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

[8] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twentieth Region in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

We will, on request, bargain in good faith on bargainable issues, including sick leave, in the event our employees designate the above-named union or any other labor organization, their bargaining representative.

RAYTHEON COMPANY, *Employer.*

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Box 36047, San Francisco, California, 94102 (Telephone No. 556-0335)

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guarantee in section 7; * * *

* * * * *

Sec. 10(c) The testimony taken by such member, agent, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in

the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

APPENDIX E

United States Court of Appeals for the Ninth Circuit

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

Judgment

Upon Petition to enforce an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of respondent for dismissal of petition to enforce and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to enforce order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 19, 1969.

United States Court of Appeals for the Ninth Circuit

No. 22572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT, and RAYTHEON COMPANY, INTERVENOR

Judgment

Upon Petition to Review an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of intervenor for dismissal of petition to review and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to review order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 9, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969